CITIZENS NATIONAL BANK v. WALTON.*

Supreme Court of Appeals: At Richmond.

November 17, 1898.

Absent, *Cardwell* and *Riely*, JJ.

1. EVIDENCE—*Endorsement of negotiable note.* An endorsement by one of two payees of a negotiable note to the other by which the endorser "assigns and transfers" to such other "all right, title and interest" in the note is equivalent to a blank endorsement of the note, carrying with it the consequences of an endorsement without restriction or limitation, and cannot be varied or contradicted by evidence of any contemporaneous parol agreement between the parties.
2. NEW TRIALS—*Decision by trial court without a jury.* It is unnecessary to make a motion for a new trial in the trial court in order to have the judgment reviewed in this court, where the whole matter of law and fact is submitted to and determined by the trial court without the intervention of a jury.

Argued at Staunton. Decided at Richmond.

Error to a judgment of the Circuit Court of Page county rendered February 15, 1898, in a proceeding by a motion for a judgment wherein the plaintiff in error was the plaintiff, and the defendant in error was the defendant. *Reversed.*

The opinion states the case.

Sipe & Harris, and *Francis L. Smith*, for the plaintiff in error.

Barton & Boyd, and *Walton & Walton*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

L. H. Baldwin, on October 15, 1890, made and signed the following note:

"$1,333.33. ROANOKE, VA., Oct. 15, 1890.

Two years after date, for value received, I promise to pay to Wm. M. Fielding and S. A. Walton, or order, without offset, the sum of thirteen hundred and thirty-three 33-100 dollars, with interest from date, at the rate of six per cent. per annum, negotiable and payable at the Commercial Bank of Roanoke, at Roanoke, Virginia. Homestead and all other exemptions waived by the maker and each endorser of this note. (Signed) L. H. BALDWIN."

This note is endorsed as follows:

"For value received, I hereby assign and transfer unto W. M. Fielding all right, title and interest that I may have in the within note.

Witness my hand, this 29th day of December, 1890. S. A. WALTON.

(Signed) W. M. FIELDING."

* Reported by M. P. Burks, State Reporter.

The plaintiff in error, the Citizens National Bank of Alexandria, became the owner of this note for value in due course of business, and not being paid at maturity it was protested and notice thereof given to the endorsers, Walton and Fielding. The bank, in July, 1897, instituted suit on said note against S. A. Walton, who presented two grounds of defence: First, that he was not liable as endorser on said note, and did not endorse it; Second, that he was not liable as assignor on the note, because the bank did not use due diligence to make the money out of the drawer thereof, or out of the person to whom the defendant assigned the same.

The court rendered judgment for the defendant, and the bank having, during the progress of the trial, taken two bills of exceptions, the cause is now before us upon a writ of error.

The defendant Walton offered himself as a witness in his own behalf, and he was permitted to testify, notwithstanding the objection interposed by the bank, and this ruling of the court constitutes the subject-matter of the first bill of exceptions.

Walton's testimony is as follows: "Mr. Fielding and myself made sale of our property, which was real estate held jointly at Roanoke, Va., in October, 1890. The cash payment was divided equally between us. The purchaser (Mr. Baldwin) executed six notes to us for the sum of $1,333.33 each, for the deferred payments, and these notes were also equally divided between us. I assigned and transferred all right, title and interest that I had in the three notes which Mr. Fielding got to him as appears on the back of the note sued on. Mr. Fielding made identically the same assignment and transfer of his interest in the notes which I got to me. Subsequently Mr. Fielding had the plaintiff to discount the note sued upon for himself and received the proceeds. I had nothing whatsoever to do with that transaction, nor did I receive any of the proceeds thereof. I have never heard of any legal proceedings being instituted against the maker (Baldwin) of the note, nor against Mr. Fielding, by the plaintiff in this suit."

This testimony was improperly admitted. The legal import of the endorsement made by L. H. Baldwin of the note in question is that he transferred it to the plaintiff and assumed upon himself the ordinary liability of an endorser of such bills.

As was said in *Woodward, Baldwin & Co.* v. *Foster*, 18 Gratt., at page 205: "When the legal import of a contract is clear and definite the intention of the parties is, for all substantial purposes, as distinctly and as fully expressed as if they had written out in words what the

law implies. It is immaterial how much or how little is expressed in words if the law attaches to what is expressed a clear and definite import. Though the writing consists only of a signature, as in the case of an endorsement in blank, yet, where the law attaches to it a clear, unequivocal and definite import, the contract imported by it can no more be varied or contradicted by evidence of a cotemporaneous parol agreement than if the whole contract had been fully written out in words. The mischiefs of admitting parol evidence would be the same in such cases as if the terms implied by law had been expressed."

And the learned judge who delivered the opinion in that case, says: "These general principles are of the utmost importance in the administration of justice. Without them there would be no certainty in written contracts and no safety in the most formal transactions. *They ought not to be frittered away by nice distinctions to meet the hardships, real or supposed, of particular cases.*" See also *Martin* v. *Lewis*, 30 Gratt. 682.

The endorsement in the case cited from 18 Grattan was in blank. Here the assignment is written at large in terms almost identical with those used in *Maine Trust Co.* v. *Butler*, 48 N. W. R. 333, where the endorser was held liable as upon an ordinary endorsement, the court saying: "The appellant in this case, with much care, indicated his purpose to sell and transfer the note, but he failed to limit and qualify his endorsement by words which would clearly indicate such intent, if in fact it existed. It was incumbent upon him to do so if he intended or expected to escape the liability of the ordinary endorser. . . . To relieve one who puts his name on the back of a negotiable promissory note from liability as endorser, he must insert in the contract itself words clearly expressing such intention."

The note in this case being made payable to two payees it was, of course, necessary for both of them to endorse it in order to pass title. It is a negotiable note. The title to it was in Walton and Fielding. Neither could negotiate it without the assent of the other. In order, therefore, that the exclusive right to it might be vested in Fielding, it became necessary for Walton to endorse it. This he could have done in terms which would have restricted and limited his liability had he seen fit to do so, but endorsing it in the terms used by him is equivalent to a blank endorsement, and is presumed to have been made by him in order to give credit to it by his name. By that endorsement he clothed Fielding with power to negotiate that note and receive its proceeds, and an innocent purchaser for value took it freed from any

equity between Walton and Fielding. The endorsement of Walton is the legal equivalent of a blank endorsement, and carries with it the consequences of an endorsement without restriction or limitation. This view seems not only consonant to reason, but is essential to the credit of negotiable paper and to the convenience of commercial transactions. It is also sustained by authority of the greatest weight and respectability.

In Daniel on Negotiable Instruments, section 684, it is said: "If several persons not partners, are payees or endorsees of a bill or note, it should be endorsed by all of them, unless it be expressed to be payable to the order of either of them, or to the order of certain ones of them, in which cases their endorsement would suffice. Either one of the joint payees may authorize the other to endorse for him, and an assignment of his interest in the paper from one to the other carries with it such authority." See also Parsons on Bills and Notes, at p. 5.

The learned counsel for defendant in error argues with earnestness and ability that the meaning of the language just quoted is, that while a joint payee may authorize his co-payee to endorse for him, "and that one of two payees, by assigning to the other all of his interest in the notes, puts it in the power of the assignee-payee to be an endorser of the whole note; that is, being then the owner of the whole note, he may, by his own act, endorse it to another and thereby assume all the liability of an endorser."

This argument, if sound, would make Walton liable as assignor upon his endorsement to Fielding, who, being thus invested with the whole interest and title to the note, would by his endorsement become liable as an endorser and not as an assignor. As we have seen, the language used by Walton would, standing alone, without doubt, and as we understand without controversy, have rendered him liable as an endorser; and while the argument presented by counsel for defendant in error is ingenious, we cannot assent to it as sound, for we are unable to perceive how an instrument confessedly negotiable, endorsed in language which, standing alone, would render him who used it liable as an endorser, is made to import a liability as assignor by reason of the fact that Walton was one of two payees instead of being the sole payee. If Fielding, instead of endorsing the note in blank, had employed terms identical with those used by Walton, it is not denied that he would have been liable as endorser. Can we, interpreting the contracts of Walton and Fielding, written upon the same paper, the one being the legal equivalent of the other, construe Walton's as

making him liable as assignor while the liability of Fielding is that of an endorser? To do so would be, in the language of Judge Joynes, to indulge in "nice distinctions to meet the hardships, real or supposed, of a particular case."

It is claimed by the defendant in error that, no motion having been made for a new trial in the Circuit Court, the plaintiff in error is to be considered as having waived its exceptions to the rulings of that court.

The principle invoked by the defendant in error has no application here. The reason for the rule requiring a motion for a new trial to be made before the trial court is thus stated by Judge Roane in *Guerrant* v. *Tinder*, Gilmer, 36: "The same judge may, upon a deliberate motion for a new trial, supported by argument and authority, retract a hasty opinion expressed by him in the progress of the trial." See also *Newberry* v. *Williams*, 89 Va. 299; *Town of Bridgewater* v. *Allemong*, 93 Va. 542.

In the case before us the rule should not operate because the reason upon which it rests does not exist. Here a trial by jury was waived and the whole matter of law and fact was submitted to the judge of the court who rendered judgment thereon, and it would have been but an idle form to call upon the court to grant a new trial upon the same law and evidence upon which it had just rendered judgment.

In *N. & W. R. Co.* v. *Dunnaway*, 93 Va. 34, there was a writ of error to the judgment on a demurrer to evidence. Defendant in error moved to dismiss the writ, but the court denied the motion, Judge Buchanan saying in his opinion that "there is no necessity to move for a new trial in the trial court in order to have the judgment on a demurrer to evidence reviewed in this court."

We are of opinion that the case is properly before us, and that there is error in the judgment of the Circuit Court, which is accordingly reversed, and this court will enter such judgment as the Circuit Court should have rendered. *Reversed.*

NOTE.—In an article on the Negotiable Instruments Law (4 Va. Law Reg. 145) it is stated that decisions similar to that in *Woodward, Baldwin & Co.* v. *Foster*, 18 Gratt. 200, had been made in *Brown* v. *Spofford*, 95 U. S. 474, and *Burke* v. *Dulaney*, 153 U. S. 228. The latter citation should have been *Burnes* v. *Scott*, 117 U. S. 582, but it will be found, on examination, that in each of these cases the contemporaneous parol agreement was sought to be set up against an innocent third party, and not by the maker against the original payee of the note, and for that reason the cases are not similar to *Woodward* v. *Foster*, *supra*.

The principal case seems to be in harmony with the general rule of evidence

which forbids the introduction of evidence to establish a *parol* contemporaneous agreement to contradict or vary a valid written agreement. *Towner* v. *Lucas*, 13 Gratt. 705. Much of what was said in *Woodward, Baldwin & Co.* v. *Foster*, *supra*, applies with full force to the principal case, but the latter is essentially different from the former in many respects, and presents a much stronger case for the application of the *general rule* than *Woodward, Baldwin & Co.* v. *Foster*. Many courts would probably dissent from *Woodward, Baldwin & Co.* v. *Foster*, but few, if any, from the principal case.

Woodward, Baldwin & Co. v. *Foster*, *supra*, is in direct conflict with *Burke* v. *Dulaney*, 153 U. S. 228, which holds that "in an action by the payee of a negotiable note against the maker, evidence is admissible to show that a parol agreement between the parties, made at the time of the making of the note, that it should not become operative as a note until the maker could examine the property for which it was to be given, and determine whether he would purchase it." Mr. Justice Harlan delivered the unanimous opinion of the court, in which he reviews the previous cases, and especially *Burnes* v. *Scott*, *supra*. Of the latter case he says that the defence was sought to be made against an innocent holder for value of negotiable paper, but that if it had been an action by the payee against the maker quite "a different question would have been presented." The conclusion reached by the court was that if the agreement between the maker and payee was that the note was not to become a contract, or a promissory note which the payee could at any time rightfully transfer, except in a named contingency, then, in an action on the note by the original payee against the maker, the contemporaneous parol agreement could be shown. It was said that such evidence did not contradict or vary a written contract, but tended to show that the parties had never *reached* a final and unconditional agreement. The opinion is an able discussion of the subject, and is well worth reading.

The principal case, of course, had to be decided as the law was at the time of the rendition of the judgment by the trial court. *Anderson* v. *Hygeia Hotel Co.*, 92 Va. 687. Section 68 of the Negotiable Instruments Act (Acts 1897–8, p. 905) declares that "as respects one another, endorsers are liable *prima facie* in the order in which they endorse, but evidence is admissible to show that as between or among themselves they have agreed otherwise." It is presumed that, as between endorsers, this changes the law in some respects, as announced in the principal case, and upon reason it would seem that the same rule should apply between maker and original payee, but no reliable opinion can be given on a statute which has not been construed by the court of last resort.

A valid negotiable instrument which has been redeemed by the maker *and cancelled* before maturity, and afterwards stolen by a third party who removes the cancellation marks and puts it into circulation, is void even in the hands of a *bona fide* holder for value. *District of Columbia* v. *Cornell*, 130 U. S. 655. In Virginia the instrument would be deemed void even though never cancelled. *Branch* v. *Commissioners of Sinking Fund*, 80 Va. 427. As to endorsement in the form of an assignment, see 3 Va. Law Reg. 464.

M. P. Burks.